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DR CHRISTIAN JURGEN KAUL & ANOR

v.

MERU VALLEY RESORT BHD

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HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[CIVIL SUIT NO: 22NCVC-212-09-2011]
20 MAY 2013

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CONTRACT: *Terms - Implied terms - Deed of mutual covenants - Whether buyer of property in resort-style residential area bound to sign deed of mutual covenants with developer - Whether covenants in agreement between developer and original purchaser bound subsequent purchasers - Whether necessary for orderly communal living and maintenance of*

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common facilities and services - Whether developer could refuse supply of services if deed of mutual covenants not signed

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The plaintiffs had bought a piece of vacant land ('the land') from its previous owner in a golf resort which had been developed by the defendant as a gated and guarded community with common property and areas and common facilities including golf club membership. Although the plaintiffs were willing to pay for the guard and security services, utility deposits and for the construction of a bungalow on the land, they refused to sign the

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deed of mutual covenants ('DMC') which all purchasers of property in the resort had signed with the defendant. The DMC, *inter alia*, governed matters of utility, guard and security services, use of common facilities and terms for the construction of one's home in the resort. *Inter alia*, the defendant had built and

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maintained a water supply system for the resort and as it had yet to hand it over to the state's water distribution licensee, LAP, the defendant distributed water which was supplied by LAP to all residents in the resort. It was billed by LAP from bulk meter readings and the defendant, in turn, billed individual residents in

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the resort for their respective usage of water as recorded by their individual meter readings. The plaintiffs wanted to have access to the defendant's water supply system but the defendant refused to supply them water unless they signed the DMC first. The defendant contended that as the plaintiffs chose to purchase

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property within the resort, they were bound, like the other purchasers, by the terms and conditions concerning the common facilities and provision of utility services and that the terms

incorporated into the sale and purchase agreements signed between the defendant and the first purchasers bound subsequent buyers of the properties. In the instant suit, the plaintiffs sought, apart from damages, a declaration that the defendant had no legal right to stop the plaintiffs from receiving water supply to their land and an injunction restraining the defendant and its agents from preventing the plaintiffs from connecting water supply to the land. The defendant counterclaimed for arrears of charges for maintenance and services with interest. The plaintiff claimed its action against the defendant was for the tort of nuisance for denying them access to water supply although no particulars of nuisance and of the loss and damage suffered thereby were pleaded.

Held (dismissing claim and allowing counterclaim):

(1) There was nothing objectionable or unreasonable in the defendant's requiring the plaintiffs to sign a DMC before it supplied them water. There was also nothing objectionable in the terms of the DMC and the house rules that came with it either. Although some terms might have been drafted much in the defendant's favour, they were not totally unreasonable. (paras 38 & 55)

(2) Even if it was the LAP that supplied the water, the plaintiffs could not just want to pay the deposit with the defendant but refused to sign an agreement in the standard form governing the rates and other clauses like termination of water supply for default in payment. It was axiomatic that anyone providing water, electricity and security services and the like would require a written agreement to be signed between them and the consumer. (para 64)

(3) By buying into the concept of resort living, it was implied that the plaintiffs had agreed to abide by what was already in place with respect to the contractual obligations of the previous owner *vis-à-vis* the developer and also as between purchasers. There were covenants between the developer and the original owner that were binding on subsequent purchasers like the plaintiffs. The defendant could argue that the plaintiffs had impliedly agreed to sign a DMC to govern the use, maintenance and payments for common areas and common facilities and if they refused to sign, they could not then complain if the particular service was not provided for. (paras 65, 68 & 71)

(4) The plaintiffs' case did not even remotely come near to the tort of nuisance. It was more a question of contract between the plaintiffs' predecessor-in-title and the defendant as well as between the plaintiffs and the defendant. (para 45)

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Cooke v. Chilcott [1876] 3 Ch D 694 ***(refd)***

Halsall and Others v. Brizell & Another [1957] 1 Ch 169 ***(refd)***

Ho Siew Choong v. On-Kward Realty Sdn Bhd & Anor [2000] 8 CLJ 175 HC ***(refd)***

Kong Peng Pew & Ors v. Meru Valley Resort Bhd [2003] 6 CLJ 392 HC ***(refd)***

Mariam Shaik Mohd Omar v. Ong Chin Poh [1994] 3 CLJ 635 HC ***(refd)***

Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor [2009] 1 LNS 512 HC ***(refd)***

PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***

Premier Model (M) Sdn Bhd v. Phileo Promenade Sdn Bhd [2001] 1 LNS 173 HC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 ***(refd)***

Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] CLJ 544; [1982] CLJ (Rep) 326 FC ***(refd)***

The Chartered Bank v. Yong Chan [1974] 1 LNS 178 FC ***(refd)***

Wisma Punca Emas Sdn Bhd v. Dr. Donald R O'Holohan [1986] 1 LNS 46 SC ***(refd)***

Legislation referred to:

Strata Titles Act 1985, s. 6

Water Services Industry Act 2006, ss. 2, 4(2), 20, 37, 47

Other source(s) referred to:

Clark & Lindsell on Torts, 18th edn, London, Sweet & Maxwell, 2000, p 979

For the plaintiffs - Andrew Soong Tze Toong; M/s BH Koh Soong, Zarin & Partners

For the defendant - Baburaj Raja Gopal (Rachael Shanti with him); M/s Kean Chye & Sivalingam

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiffs had been staying in the Meru Valley Resort ("Resort") in Ipoh for a while in a rented place before they decided to buy one of their own. It is a new concept of living in a Golf Resort within a gated and guarded community developed by the defendant, a housing developer. There are common property, areas and facilities that all who are residents there could enjoy.

[2] The plaintiffs bought a vacant land known as Lot No. 259 ("the said land") in the Resort from a previous owner *vide* a sale and purchase agreement dated 7 December 2009. The plaintiffs wanted to tap into the water supply provided by the defendant. The defendant said that the plaintiffs must first sign a Deed of Mutual Covenant where matters of utility services, guard and security services, use of common facilities and terms for the construction of one's home in the resort are set out. The plaintiffs refused and yet insisted that they are entitled to the water supply in any event and that it would be the tort of nuisance that the developer would have committed if it continued to prevent them from having access to the water supply.

[3] Both sides refused to budge and we see here how a simple disagreement has deteriorated to a dispute that has come before the court for determination and disposal.

Problem

[4] The plaintiffs' argument is an ingenious one. They said that the defendant is not a licensed holder of the water supply system within the resort and as such is not clothed with any authority in law to stop the plaintiffs from tapping into the water system.

[5] The defendant contended that it had constructed the water supply system as the developer of the resort and pending the handing over of the system to the State Water Authority, in this case the Lembaga Air Perak ("LAP"), it is legally obliged to supply and maintain the water system subject to terms. The legal basis for the contractual duty that the developer has to provide maintenance services and utility (including water supply) to all residents in the resort until the appropriate authorities take over

the same is by virtue of the relevant clauses in the original sale and purchase agreement ("original S&P") signed between the developer and the original previous owner.

[6] The defendant further contended that as the plaintiffs have opted to purchase a vacant lot within the resort to build their house, they are bound by the terms and conditions with respect to the common facilities enjoyed by all in the community living concept. The terms of the original S&P with respect to the payment of water for instance would bind all the purchasers whether they had bought their lot from the developer direct or through a sub-sale.

Prayer

[7] The plaintiffs had filed this suit seeking, *inter alia*:

(i) A declaration that the defendant is not a license holder for a water supply system and does not have any right in law to stop the plaintiffs from getting water supply to the said land;

(ii) An injunction against defendant and/or its workers and/or its agents from stopping the plaintiffs to start work on the connection of the water supply to the said land;

(iii) General damages

(a) at the rate of 8% per annum from 18 November 2010 on the purchase price ie, RM872,508;

(b) RM5,000 per month from the date of the writ ie, 9 September 2011 being the rental unnecessary incurred;

(iv) Exemplary damages of RM500,000;

(v) Interest and cost.

[8] The defendant had counter claimed as below:

(i) RM3,578.53 being the maintenance charges and services as at 3 September 2011 and still continuing;

(ii) Late payment interest at the rate of 10% on the outstanding amount;

(iii) Interest at 4% on the judgment sum;

(iv) Cost.

Preliminary Point

[9] The word "nuisance" does not appear anywhere in the plaintiffs' statement of claim. It was only on the first day of trial that the plaintiffs' counsel, Mr Andrew Soong, informed the court that the plaintiffs' cause of action is under the tort of nuisance. Learned counsel for the defendant, Mr Baburaj Rao, submitted that it was never part of the plaintiffs' pleaded case and also not referred to as such in the plaintiffs' summary of case.

[10] M Baburaj also pointed out that no particulars of nuisance had been pleaded and neither were any particulars of loss and damage set out in the claim. According to him, the closest and even then still cast off, that the plaintiffs came to vaguely ventilate their claim under nuisance was in para. 19 of the statement of claim when they pleaded as follows:

> The defendant's conduct in stopping the plaintiffs in commencing the connection works for the water supply had prevented the plaintiffs from enjoying the said land.

[11] The defendant submitted that the plaintiffs should have set out the particulars relating to the alleged nuisance, loss and damages as can be seen in the following texts:

(a) Bullen & Leake & Jacob *Precedents Of Pleadings* 13th edn. Sweet & Maxwell 1990; and

(b) *Singapore Precedents of Pleadings*, Jeffrey Pinsler, Sweet & Maxwell 2010.

[12] It is cardinal rule in civil litigation that parties must abide by their pleadings. It is said that a court should not decide on issues not raised in the pleadings as such a judgment is bound to be set aside as explained in the case of *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157.

[13] Recently, the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 held that:

> Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a

fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings. This is trite as can be seen from the decision of this court in *Menah Sulong v. Lim Soo & Anor* [1983] 1 CLJ 26 where Ong Hock Thye CJ said:

> I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd & Anor v. Southport Corporation* [1956] 2 WLR 81 at p 91:
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> > If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system.

In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:

> It is trite law that a party is bound by its pleadings.

On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[14] His Lordship Abdul Hamid J (as he then was) in *Mariam binti Shaik Mohd Omar v. Ong Chin Poh* [1994] 3 CLJ 635; [1994] 3 MLJ 419 in the context of vagueness in pleading a cause of action in nuisance observed as follows:

> But, nowhere in the statement of claim did the plaintiff make any mention of nuisance or any injury to the plaintiff. The plaintiff's claim only speaks of damage to her property when the construction work was being carried out by the defendant. It is clear to me that the plaintiff did not plead nuisance. I agree with the finding of the learned sessions court judge on this point.

[15] The whole purpose of pleading is of course to make sure that a defendant is not prejudiced at all by a plaintiff's claim that may be confusingly and vaguely couched or having a proclivity for

prolixity. Depending on the predisposition of a judge who may have more of a penchant for a purist approach to pleading, anything that falls short of precision in pleadings might be rejected altogether as having not been properly pleaded.

[16] His Lordship Seah SCJ in his dissenting judgment in *Wisma Punca Emas Sdn Bhd v. Dr Donald R O'Holohan* [1986] 1 LNS 46; [1987] 1 MLJ 393 observed in the context of a claim in nuisance as follows at p. 398:

> I am clearly of the opinion that *action framed on nuisance ought to be distinctly and expressly pleaded in the statement of claim in order to give to the defendant a fair notice to meet it. A fortiori*, the pleadings ought to specify whether or not negligence is to be relied upon to establish it. In my opinion, if the respondent's case were put in the alternative in this manner, the proceedings would no doubt have been developed on wholly different lines. The ambit of discovery would have been enlarged and it is idle to speculate what would have happened if such a case had been made out. (emphasis added)

[17] His Lordship Wan Suleiman SCJ, pursuing more of a practical approach that so long as a defendant is not taken by surprise and not prejudiced in any way would observe as follows at p. 396 (MLJ):

> As has been indicated earlier learned counsel for the respondent said that the cause of action is founded on the natural right of support. That, in the context of the present case is the same as saying that the claims is based on nuisance. In any event it is clear beyond per adventure that the **appellant/defendant was not caught by surprise and his defence was in answer to what is was alleged in the statement of claim**. (emphasis added)

[18] The third judge in the corum His Lordship Wan Hamzah SCJ agreed with the approach taken by His Lordship Wan Suleiman SCJ and observed as follows at p. 398 (MLJ):

> I have had the opportunity of reading the judgments in draft of my learned brothers Tan Sri Dato Wan Suleiman and Dato George K.S. Seah. With due respect I agree with Tan Sri Dato Wan Suleiman that the appeal should be dismissed with costs. In my opinion **averment of nuisance can be perceived from the allegations of the facts contained in the Statement of Claim although the word "nuisance" is not stated**. (emphasis added)

[19] I would gladly adopt the *dicta* of His Lordship Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 at p. 15; [2000] 2 MLJ 600 at p. 606:

> First, the learned judge erred in holding that the Industrial Court had decided the case dehors the pleadings. The case was adjudicated upon an unpleaded point. All the facts relevant to the point at issue had been pleaded. It is only the legal result that had not been pleaded. It is not necessary, even at common law, to plead the legal result flowing from a set of pleaded facts. There had been written argument about the legal result. Since all the relevant evidence was before him, the learned chairman acted with propriety in holding that there had been a breach of the implied term in question.

[20] The Federal Court in *Siti Aisha Ibrahim v. Goh Cheng Hwai* [1982] CLJ 544; [1982] CLJ (Rep) 326 at p. 328; [1982] 2 MLJ 124 at p. 126 had put in proper perspective the prime importance of pleadings in the context of a fair trial where no one can be said to have been taken by surprise or prejudiced in anyway:

> The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was "lawfully walking along the proper side of the road, in her evidence she clearly said that she was walking across the road. Moreover in her police report included in the Agreed Bundle of Documents (Ex.P.1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.
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> It is clear therefore that the **defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading** because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.
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> On appeal the learned judge allowed the appeal but for different reasons. He appreciated that the plaintiff's evidence was contrary to her pleadings, but in view of other findings he did not think it necessary to lay too much emphasis on technicalities.

In this court in the case of *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10 the learned Chief Justice Raja Azlan Shah delivering the judgment of the court at p. 12 said:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded.

In another case *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] 2 MLJ 182 in this court, Abdoolcader J delivering the judgment of the court, said that "although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered. (emphasis added)

[21] One would have to hold in a delicate balance the competing and conflicting principles in the court's anxious aim to do justice in the case brought before it. Vagueness in pleadings must not be of such a nature and to such an extent that it would be vexatious for a defendant to proffer an answer to the plaintiff's claim. Though inelegantly drafted and imprecise, the plaintiff's pleadings are not such as to prejudice the defendant from parrying point by point the plaintiff's complaint, as the defendant had indeed done here. If the plaintiffs' claim had been so confusingly vague the defendant had every liberty to have applied for it to be struck out on ground that it does not disclose a reasonable cause of action in nuisance or otherwise, or that it is frivolous and vexatious or otherwise an abuse of the court's process.

[22] I had thus proceeded to hear the plaintiffs' claim on its substantive merits and to consider below whether the facts as pleaded and proved amount to the tort of nuisance.

Whether The Facts As Pleaded And Proved Against The Defendant Amount To The Tort Of Nuisance

[23] In *Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor* [2009] 1 LNS 512 in Guaman Sivil No. S6-22-106-2003 His Lordship Harmindar Singh Dhaliwal JC (as he then was) said:

> Nuisance is defined as an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a private nuisance …

[24] A passage in *Clark & Lindsell on Torts,* 18th edn., London, Sweet & Maxwell, 2000, at p. 979 is instructive and illuminating. It reads as follows:

> It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as voice, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours … No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.

[25] It would appear therefore that the primary consideration is the question of reasonableness. In this regard, whether an act constitutes a nuisance cannot be determined by an abstract consideration of the act itself, but by reference to all the circumstance of the particular case; the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously on in the reasonable exercise of rights; and the effect of its commission, that is whether it is continuous; so that it is a question of fact whether or not a nuisance has been committed.

[26] In *Clerk & Lindsell on Torts*, 18th edn. it was also stated:

> The essence of nuisance is a condition or activity which unduly interferes with the use of enjoyment of land.

[27] In the *Law of Torts in Australia* 2nd edn. it was stated as follows:

> A nuisance is an interference with the use and enjoyment of land, and so the plaintiff must have an interest in or appropriate rights over the land. The basic interest which gives a right to sue is possession.
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> Most private nuisances arise out of the use by the defendant of his land, but since nuisance is an tort involving interference with the use of land rather that a tort arising out of the unlawful use of land, acts can constitute a nuisance even if they are not done by the defendant on his land.

[28] In *Clerk & Lindsell on Torts*, 18th edn. it was stated: A

> The person liable for nuisance is the actual wrongdoer, whether or not he is in occupation of the land.

[29] The plaintiffs' contention is that as owners of the said land in the resort the use and enjoyment of it is intrinsically linked to B the right to have supplied of water pursuant to s. 37 of the Water Services Industry Act 2006 (WSIA):

> Subject to subsection 2, a water distribution licensee shall, on application in writing by the owner or occupier of any premises, C supply water to the premise.

[30] The question is whether the defendant is a water distribution licensee?

Section 4 of the WSIA provides as follows: D

> 4(1) Subject to s. 5, no person shall:
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> (a) own a public water supply system or public sewerage system or any part of the systems; or
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> (b) undertake, provide or make available any water supply services or sewerage services or part of the services by means of operating a public water supply system or public sewerage system, unless he holds an individual licence granted under this act.
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> 4(2) Notwithstanding subsection (1), *a developer of* a sewerage system or *water supply system who is required under s. 47 to hand over such sewerage system or water supply system to a licensee shall not be required to hold an individual licence* for the ownership of the sewerage system or water supply system until the sewerage system or water supply system is completed or commissioned G which ever is earlier. (emphasis added)

[31] It is expressly stated above in s. 4(2) of the WSIA 2006 that a developer pending handing over shall not be required to hold an individual licence for ownership of water supply system. H

[32] The plaintiffs also referred the court to s. 20 of the WSIA which governs a private water supply system:

> (1) Subject to s. 22, no person shall:
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> (a) own a private water supply system or private sewerage system or any part of the systems; or

A (b) undertake, provide or make available any water supply services or sewerage services or part of the services by means of operating a private water supply system or private sewerage system, unless he holds a class licence granted under this Act.

B **[33]** The defendant is a developer of a housing development which comes under the ambit of s. 47 of the WSIA 2006 which reads:

> Subject to subsections (2) and (5), *a developer of a new development which is within a service licensee's water supply distribution area* or sewerage services area, as the case may be, *shall, upon the issuance of the certificate of compliance of the water supply system* or sewerage system or part of the systems by a qualified person, *hand over the water supply system* or sewerage system or part of the systems within the development *to the water distribution licensee* or the service licensee providing sewerage services, as the case may be, *at no cost,* for the purposes set out in subsection (3). (emphasis added)

[34] I have no good reason to disagree with the defendant's witness DW2, Cik Hayatunnisah Sulaiman, who is the Director of Legal and Secretariat Services, Suruhanjaya Perkhidmatan Air Negara (SPAN) that there is no requirement under the WSIA 2006 for the defendant to apply for any licence during the transition period to hand over to Lembaga Air Perak (LAP) who is the water distribution licensee for water supply services in Perak. She explained clearly that LAP distributes and supplies water to consumer by means of the public water supply system as defined in s. 2 of the WSIA as follows:

> 'Water supply system' means the whole of a system incorporating public mains, pipes, chambers, treatment plants, pumping stations, service or balancing reservoirs or any combination thereof and all other structures, installations, buildings, equipment and appurtenances used and the lands where the same are located for the storage, abstraction, collection, conveyance, treatment, distribution and supply of water;

[35] She further clarified that LAP would only operate and maintain the waters system only upon handing over the water system as envisaged under s. 47 of the WSIA. A developer like the defendant who has on-going development is not required to have a license under the WSIA until the full handing over of the water system to LAP.

[36] From the testimony of DW2 it is clear that the sections quoted by the plaintiffs ie, ss. 37, 20 and the definition of "water supply system" are not applicable to the defendant in this action. A

[37] The plaintiffs in their own pleadings at para. 5 of their statement of claim had acknowledged the fact that it was the defendant who had completed the water supply system and is currently supplying water to the residents of the resort. B

[38] Though statutorily under the WSIA the defendant is not obliged to supply water to the plaintiffs for it is not the licensee under the WSIA but that LAP is when the water system is handed over to them, yet contractually the defendant is obliged to and indeed would want to do just that provided a proper agreement encompassing not just water supply but other utility services and amenities incorporated into a Deed of Mutual Covenant ("DMC") is signed by the plaintiffs. I find nothing objectionable nor unreasonable in this such as to constitute nuisance on the part of the defendant. C D

[39] Learned counsel for the plaintiffs referred to the case of *Ho Siew Choong v. On-Kward Realty Sdn Bhd & Anor* [2000] 8 CLJ 175, where Mohd Saari Yusoff J ruled that "the act of cutting off the water supply to the said premises constituted nuisance". The facts are clearly distinguishable from the present case where no agreement had been signed for the supply of the water. E F

[40] In the case of *Kong Peng Pew & Ors v. Meru Valley Resort Bhd* [2003] 6 CLJ 392, the court had made a finding for an injunction against Meru Valley Resort Bhd because it had cut off the plaintiffs water supply because there was dispute of maintenance charges. The test is of course on the balance of convenience as there is a serious issue to be tried. It was an interlocutory application and decision pending the full hearing of the matter. G

[41] It is also interesting to note that on facts not too dissimilar to the present case, it was held by His Lordship Azmel Maamor J (as he then was) in *Premier Model (M) Sdn Bhd v. Phileo Promenade Sdn Bhd* [2001] 1 LNS 173; [2001] MLJU 25 as follows: H

> As to provider of water supply to the individual units the defendant argued that the Selangor State Water Department only supplies water to the Bulk Meters. It was not their responsibility I

to supply water to the individual units. The responsibility to do so is taken over by the defendants. The contention by the plaintiff that s. 5.01(b)(4) is ambiguous was misconceived.

After having considered the arguments by both counsels I was in full agreement with the views of counsel for the defendants. Having read the wordings of s. 5.01(b)(4) I am quite satisfied that this section is clearly worded and contains no ambiguity at all. It is quite true that the Selangor State Water Department only supplies water to the Bulk Meters. This is confirmed by the department's letter to the defendant dated 31 May 1999 stating that the responsibility of the Selangor State Water Department is only to supply water to the Bulk Meters. The supply of water to the individual units is the responsibility of the defendants. This is clearly stated in the definition of *"Service Charges"* in s. 1.01(m) which I have dealt with earlier. Since it was my finding that the wordings of s. 5. 01(b)(4) contains no ambiguity I therefore ruled that the *contra proferentem* rule is not applicable. And also since it was my finding that the natural and ordinary meaning of s. 5. 01(b)(4) is expressly clear the burden lies on the plaintiff to prove the application of any of the exceptions to ss. 91 and 92 of the Evidence Act. But the plaintiff had failed to produce such evidence. In the circumstances I ruled that *it was not improper for the defendant to exercise their rights under s. 5. 01(b)(4) of the agreement to suspend the water supply to the plaintiff's units.* (emphasis added)

[42] Mr Bernard Tan DW1 had testified as follows:

I confirm that pursuant to Clause 13 of the sale and purchase agreement (p. 9 of Bundle B), the defendant as the developer has to construct amongst other infrastructure the main water supply and the reticulation system and maintain the same until taken over by the relevant authority, in this case being Lembaga Air Perak (LAP). The defendant is distributing the water supplied by LAP to all residents of Meru Valley Resort. The defendant is billed by LAP from bulk meter readings and in turn bills individual residents of Meru Valley Resort their proportionate usage as recorded by their individual meter readings respectively.

[43] Even if it is LAP as licensee who is the party supplying the water to the plaintiffs, the LAP would also require the plaintiffs to sign an agreement governing the rates at which the water is supplied, the deposit and monthly payment and circumstances under which the service may be terminated. If it is a case where certain terms are objectionable, it is for the plaintiffs to sign under

protest and to challenge those clauses in court rather than not wanting to sign at all and then embarking on an action for damages for a supposed action in nuisance.

[44] I agree with the defendant that here it is not a case of the defendant preventing the plaintiffs from tapping into water that naturally flowed through the land. Rather it is a system where the defendant has purchased the water from LAP and had constructed the necessary piping and pumping system and meter reading to make this water is safe and available to all residents who would enter into a contractual relationship governing the supply of the water.

[45] In the circumstances, the plaintiffs' allegation does not even remotely come near to the tort of nuisance. It is more a question of contract between the plaintiffs' predecessor-in-title and the defendant as well as between the plaintiffs and the defendant.

Whether Contractually The Defendant Has A Right To Insist On The Execution Of An Agreement Before Supplying Water To The Plaintiffs

[46] The plaintiffs had been staying in the resort for a while before deciding to buy the said land. They had bought the said land from its previous owner under an S&P dated 7 December 2009. Clause 13 of the original S&P dated 23 April 1999 between the developer and the original purchaser from whom the plaintiffs had bought the said land reads:

> 13(1) The developer shall at its own costs and expense cause to be constructed the main roads, main drains, water works mains, ... serving the Bungalow Lot in accordance with the requirements and standards of the Appropriate Authorities ... The aforesaid works are hereinafter collectively referred to as the Infrastructures.
>
> 13(2) *The purchaser shall bear, pay and discharge all charges payable for the supply and consumption of water,* electricity and telephone services to the buildings which the purchaser shall erect on the Bungalow Lot and *shall be liable for all deposits, tapping and turning on fees, and the application and installation of separate meters for the same whenever necessary.* (emphasis added)

[47] Clause 14 of the original S&P further provides as follows:

> 14(1) From the date of delivery of vacant possession of the Bungalow Lot to the purchaser the developer subject to Clause 14(2) below shall be obliged to provide the following services:

A (a) to provide grass cutting once for every 45 days for the Bungalow Lot;

(b) to *maintain, upkeep and repair the infrastructures until the infrastructures are taken over by the Appropriate Authorities* ...

B (c) to maintain the landscape of the Project Land ...

14(2) In consideration of the aforesaid services stated in Clause 14(1) the purchaser agrees to pay the developer an annual sum of an amount to be determined by the developer which sum shall be payable to the developer in advance (and not in arrears) every C year commencing simultaneously with the delivery of vacant possession of the Bungalow Lot to the purchaser ...

14(3) The aforesaid sum stated in Clause 14(2) *shall be maintained for a period of three years* from the date of delivery of vacant possession of the Bungalow Lot to the purchaser *after which an* D *increase rate shall have to be agreed between the developer and all the Bungalow Lots purchasers failing which the developer shall not be obliged to continue to perform the said services* stated in Clause 14(1). (emphasis added)

E **[48]** Clause 35 provides for the following:

Successors Bound

This agreement shall be binding on the personal representatives, heirs, successors in title and assigns of the parties hereto.

F **[49]** The plaintiffs are not disputing that the original S&P agreement between the original owner and the defendant as developer is binding on them. Indeed by their letter dated 7 October 2010 to the defendant at p. 38 of bundle B (common bundle of document) the first plaintiff wrote as follows:

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My wife and I are the new owner of the before mentioned lot. The rights and obligations of the lot's owners and the developer, Meru Valley Resort Bhd, is regulated in the original Sale & Purchase agreement for the lot dated 23 April 1999.

H **[50]** The developer/defendant replied as follows:

We however regret to have to inform you that we are unable to accede to your request for a connection to the main water supply pipe, which will also entail the supply and connection of a water I meter, until the Deed of Mutual Covenant is executed and a payment of refundable deposit of RM5,000 is made.

> As a secondary land owner, you have been informed to execute a Deed of Mutual Covenant and Membership Agreement which were prepared to standardize the provisions for the owners/ residents of the Meru Valley Resort. In this respect, Clause 5 of the Deed of Mutual Covenant – "Maintenance Services and Utility Charges" is relevant ...
>
> We sincerely hope to have your understanding and full co-operation in this matter. (p. 41 of Bundle B)

[51] The said letter was signed off by Mr Bernard Tan, a director of the defendant who testified as DW1.

[52] In fact, the plaintiffs in their letter of 3 November 2010 to the defendant had acknowledged the enforceability of the original S&P agreement when they wrote:

> We regret to inform you that we will not be signing the Deed of Mutual Covenant and the proposed Membership Agreement as there is an existing agreement governing the procedure of constructing our house on the bungalow lot and the automatic transfer of the golf club membership. (see p. 42 of Bundle B)

[53] If the purchasers here in the plaintiffs refused to sign then there is no contractual obligation that has been formalised and finalised and parties will then have to reconsider their positions. Whatever rates had been agreed with the original owner under cl. 14(3) of the original S&P agreement had been superseded by events and there is a need to sign a DMC to cover not just the supply of water but also electricity and guard and security services. For the orderly development of the resort, the developer is vested with some discretion for the standardisation of terms and conditions and even house rules as may be necessary for preserving its original concept of resort living. This can be seen in the broad discretion giving to the developer under cl. 11 of the original S&P agreement under "Common Rights of Purchaser" and in particular seeing that every purchaser would have his own peculiarities and preferences not to mention propensities, it is provided at the end of the clause as follows:

> ...and in the event of any dispute with regard to the meaning and effect of this provision or the manner in which the same is to be effected or enjoyed the decision of the developer or its appointed agent shall be conclusive and final and shall be binding on the purchaser.

[54] Such a broad discretion already given by the original owner which is binding on the plaintiffs as subsequent and secondary owners gives liberty to the defendant to come up with a standard-form DMC. The evidence of DW1 was that all the subsequent purchasers have signed them and there is no evidence from the plaintiffs that there was anyone who had refused to sign other than the plaintiffs themselves.

[55] Living in a gated and guarded community would come with it the need to share things in common with respect to certain facilities. I have looked at the DMC tendered together with the house rules that come with it. I do not find the terms there objectionable as described by the purchasers. True some terms may have been drafted much in favour of the developer but they are not totally unreasonable.

[56] It might be more a case where a developer has taken all possible precautions taking into consideration that human beings are unpredictable. For example the developer has a clause that they are entitled to lodge a caveat against the purchaser's land for arrears of maintenance not paid. Whilst they might want to do so, there is nothing preventing the purchaser from arguing that parties cannot consent to a caveatable interest when there is none as was argued successfully in the recent Federal Court case of *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802 at pp. 821-822; [2012] 6 MLJ 475 at p. 490 as follows:

> … a caveat is purely a creature of statute and can only be lodged and maintained according to the statute by a person who is authorised to do so by the statute. Parties cannot by agreement between themselves create a caveatable interest. As was rightly held in *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113, 'the contractual provision does not amount to an equitable or other interest sufficient to support a caveat.' A contract cannot override a statute by inventing a right which is not recognised by statute. The court could not give recognition to such a right (see *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor*).
>
> [46] Any private caveat lodged outside the scope of s 323 of the NLC is bound to be removed. The burden is on the caveator to show that his caveat is within the scope of s 323 of the NLC. The respondent, as the caveator, failed to discharge that burden.

[57] There were also other clauses on purchaser indemnifying the developer against all claims in the case of a guest entering the resort and suffers injury as a result and then decided to sue the developer.

[58] There are many other clauses which this court finds not uncommon in a development of this nature. Imagine what would happen if everyone were to build as they like, or put up high fencing and park haphazardly in the relationship *inter se* with other purchasers in the resort. This stalemate could have been avoided by the plaintiffs perhaps signing under protest and later challenging the clauses in court. There is no evidence that the defendant as the developer has discriminated against the plaintiffs in any way.

[59] In the case *Halsall and Others v. Brizell and Another* [1957] 1 Ch 169 at p. 171 it was held that:

> the defendants, who could not rely on prescription or a way of necessity, were not entitled to take advantage (as they desired) of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder, *vis* the payment of calls, and that on that principle they were bound by its terms.

[60] The defendant referred to the case of *Cooke v. Chilcott* [1876] 3 Ch D 694 where a covenant by the purchaser of land with a well to erect a pump and reservoir and to supply water from the well to all houses built on the vendor's land was enforced against a subsequent purchaser of the land burdened with the covenant on the grounds that the covenant ran with the land but that in any event the defendant took with notice of the obligations. Malins V-C said, at p. 701:

> I think that when a contract entered into for the benefit of contiguous landowners, the one is bound by it and the other entitled to the benefit of it, the covenant binds him forever, and also runs with the land. But it is equally clear that he is bound by taking the land with notice of the covenant.

[61] Granted this is a development with common properties and areas and common facilities in a resort-style living in a gated and guarded community with golf membership and facilities are ahead of the times where the legal infrastructure that was then in place was where strata titles with management corporation over common

properties were only confined to high-rise buildings. We were told that there is now strata development for even landed resort such as the one developed by the defendant in a gated and guarded community with resort-style living. Section 6 of the Strata Titles Act 1985 now provides as follows:

> **6. Building or land capable of being subdivided into parcels**
>
> (1) Any building having two or more storeys on alienated land held as one lot under final title (Registry title) shall be capable of being subdivided into parcels; and any land on the same lot shall also be capable of being subdivided into parcels each of which is to be held under a strata title or an accessory parcel.

[62] As and when the time has come for strata titles to be issued the community's *esprit de corps* can rise to the occasion and do away by majority vote anything they see as infringing their personal liberty in a community living. When that comes, the future is very much in their hands with respect to provisions on the supply of water and electricity, the use of common properties and roads, parking, height of fencing, guard and security services, landscaping and even the facade of the buildings if that is of cause for concern.

[63] The plaintiffs have chosen not to budge and to see the developer in court. This is not the best way to solve a practical problem. Looking at the conduct of the plaintiffs, they are prepared to pay the construction deposit and also abide by other clauses like guard services but not signing a DMC. I can appreciate the developer's problem for they cannot have a separately tailored DMC to fit the likes and dislikes of each purchaser with each having his particular and peculiar preferences as part and parcel of the diversity in a multi-cultural community.

[64] In a very real sense the so-called problems of the plaintiffs were brought upon themselves by their own actions. On the one hand they said that the developer is illegally supplying water to the purchasers as they are not licensed under the WSIA but on the other hand they want to tap into the developer's pipes supplying the water. On the one hand they said that LAP is responsible to provide water but on the other hand they are suing the developer for not providing the water. Even if it be LAP that is supplying the water, the plaintiffs cannot just want to pay the deposit as in this case with the developer but refused to sign an agreement in

the standard form governing the rates and other clauses like termination of the water supply for default in payments of the rates. It is axiomatic that anyone providing a service such as water, electricity and security service and the like would require an agreement in written form to be signed between them and the consumer of their service.

[65] It is no exception here. Indeed by buying into the concept of resort living then, it is implied that the plaintiffs would have agreed to abide by what is already in place with respect to the contractual obligations of the previous owner *vis-a-vis* the developer and also the purchasers here *vis-a-vis* other purchasers.

[66] This is not a case of nuisance but a case where parties cannot agree on the terms of the supply of the water needed for the purchasers' land and other terms and conditions governing the use of utilities and other facilities.

[67] Perhaps on hindsight it would have been better for the law to have caught up with development. We are told that there is now such a thing as a horizontal strata title and perhaps that would have solved a problem like this. Absent that this problem is essentially a problem in contract.

[68] I find that based on contractual principles the developer can argue that the plaintiffs have impliedly agreed to sign a DMC to govern the use, maintenance and payments for common areas and common facilities. If they refused to then they cannot complain if the particular service is not provided for. It is not for the plaintiffs to choose the type of services and terms that they have no objection to like in this case the guard and security services and the deposit for water supply and even for the construction of the bungalow. More so when the plaintiffs have been accustomed to staying there before as a tenant before they bought the said land.

[69] The plaintiffs cannot approbrate and reprobrate its stand on the DMC. See the case of *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811.

[70] The Court of Appeal in the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 at p. 554; [2007] 5 MLJ 136 at p. 156 held that:

> ... The first defendant is under the obligation to investigate properly all matter relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct

A and genuine. **When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.** (emphasis added)

B **[71]** Here the plaintiffs' solicitors would have asked for a copy of the S&P agreement signed between the developer and the original owner when preparing the S&P agreement between the original owner as vendor and the plaintiffs as purchasers. The plaintiffs' solicitors would have been alerted to the fact that there are binding covenants between the developer and the original owner that are binding on the subsequent purchasers like the plaintiffs. It is for the said plaintiffs' solicitors to have enquired further with the original owner or the developer in advising their clients on the covenants that would be binding on them.

C

Pronouncement

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[72] In the circumstance the plaintiffs' claim is dismissed. I also allowed the defendant's counterclaim as there is no dispute on this but interest shall be at 4% per annum from filing of the counterclaim to realisation.

E **[73]** Based on the peculiar circumstances of this case, I made no order as to costs.

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